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DATUK SERI DR MOHAMAD SALLEH ISMAIL & ANOR v. MOHD RAFIZI RAMLI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: 23NCVC-53-06-2013]
B 31 OCTOBER 2016

TORT: *Defamation – Libel – Press conference contained statements alleged to be defamatory of plaintiffs – Allegations of misappropriation of public funds – Whether statements were fair comments or facts – Whether statements verified and based on*
C *facts established to be true – Whether defence of qualified privilege established*

TORT: *Defamation – Libel – News website published article and uploaded video clip of press conference – Press conference contained statements alleged to be defamatory of plaintiffs – Allegations of misappropriation of public funds – Whether video clip showed faithful recording of actual events – Whether reporting done in*
D *fair, disinterested and neutral way – Whether defence of reportage available*

TORT: *Defamation – Libel – Damages – Press conference contained statements alleged to be defamatory of plaintiffs – News website published article and uploaded video clip of press conference – Nature of allegations – Whether serious – Whether losses suffered attributable to defamatory statements*
E

The first plaintiff was the chairman and director of the second plaintiff while the first defendant was a politician. In a press conference held by the first defendant, the latter alleged that a portion of the proceeds of government loan given to the second plaintiff for the purposes of the national feedlot centre
F had been deposited with a bank. The deposit was then used as leverage for personal loans for the purchase of eight units of offices ('the statements'). The basis of these contentions were bank records which the first defendant received anonymously, revealing (i) customer profiles of the plaintiffs, companies related to the plaintiffs and the directors of such companies; and (ii) the details of the eight office units recorded as collateral in the bank's
G collateral system ('the documents'). The second defendant published an article on the allegations made by the first defendant and uploaded a video clip of the press conference on its website. The plaintiffs commenced an action for defamation against (i) the first defendant on the grounds that the statements were defamatory of the plaintiffs; and (ii) the second defendant for
H the publication of the video clip recording of the press conference. In claiming for damages, the plaintiffs contended that following the publication of the statements, the business of the second plaintiff deteriorated significantly. The first defendant raised the defences of fair comment and qualified privilege while the second defendant raised the defence of
I reportage. The issues that arose for the court's adjudication were (i) whether the statements made by the first defendant were defamatory of the plaintiffs; (ii) whether the words in the statements were a commentary and, if yes, whether the comments were based on facts established to be true;

(iii) whether the first defendant established defence of qualified privilege; (iv) whether defence of reportage available to the second defendant; and (v) whether the plaintiffs were entitled to damages.

Held (allowing claim against first defendant; dismissing claim against second defendant):

(1) The statements were defamatory of the plaintiffs as they had the effect of lowering the estimation of the plaintiffs in the eyes of the public. A reasonable reader reading the statements would conclude that public funds were (i) put at risk by the conduct of the plaintiffs; (ii) used as a guarantee or leverage to obtain personal loans; and (iii) expanded to purchase real estate in the private names of the first plaintiff's family members (paras 19-24)

(2) The defence of fair comment was not available to the first defendant. The statements made by the first defendant were couched as statements of fact and did not constitute a comment. The statements were premised on the documents which the first defendant had obtained. However, there was nothing in the documents that suggested that the deposit by the second plaintiff had been used either as leverage or as security or collateral for the grant of any loan. The basic facts available to the first defendant did not support the inference that he had drawn from those facts. (paras 35-37 & 39)

(3) The first defendant's defence of qualified privilege had not been made out. The first defendant testified that he had no way of verifying the accuracy or completeness of the information contained in the documents. The first defendant had time to analyse the contents of the documents and to prepare a three-page press statement. If there was sufficient time to have prepared a press statement, then there would have been time to contact the plaintiffs for verification of the allegations. Nonetheless, no attempt was made to contact the first defendant to verify the inferences that he had drawn from the contents of the documents. (paras 45, 48, 49 & 52)

(4) The effect of the reporting by the second defendant was to report the fact that the statements had been made at the press conference convened by the first defendant rather than for the purpose of persuading the reader and/or viewer of the truth of their contents. The video clip was limited to the inclusion of captions and graphics and was a faithful recording of the actual events that had taken place. The reporting was also done in a fair, disinterested and neutral way. The accompanying news article clearly attributed quotes to the first defendant in quotation marks and the journalist did not adopt the statements as her own. The urgency of the matter justified the publication of the reporting because the second defendant is part of an alternative media where currency is placed on the immediacy of reporting. The decision by the second defendant to publish the report and the accompanying video clip without verification from the plaintiffs could not be faulted. (para 73)

(5) The first defendant was liable in damages to the plaintiffs. The first plaintiff was awarded the global sum of RM150,000 in damages, taking into consideration that, *inter alia*, (i) he was a well-known and respected person; and (ii) the nature of the allegations against him was serious and suggestive of criminal impropriety. The nature of the allegations against the second plaintiff was different from that of the first plaintiff. The second plaintiff could not claim to have a reputation that was as highly-regarded as the first plaintiff. Therefore, the second plaintiff was awarded the global sum of RM50,000 in damages. The deterioration and the loss of profits claimed to have been suffered by the second plaintiff's business had nothing to do with the act of the first defendant. (paras 81, 82 & 85)

Case(s) referred to:

Al-Fagih v. HH Saudi Research and Marketing (UK) Ltd [2001] All ER (D) 48 ***(refd)***
Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2010] 5 CLJ 301 HC ***(refd)***
Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Co & Ors [2001] 4 CLJ 446 HC
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Joshua Benjamin Jeyaretnam v. Goh Chok Tong [1989] 1 LNS 34 PC ***(refd)***
Reynolds v. Time Newspapers Ltd [2001] 2 AC 127 ***(refd)***
Roberts v. Gable [2007] EWCA Civ 721 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***
Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee [2015] 8 CLJ 477 FC ***(refd)***
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Wong Yoke Kong & Ors v. Azmi M Anshar & Ors [2003] 6 CLJ 559 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 58, 103, 114(g)
Rules of Court 2012, O. 34 r. 2(2)(e)

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JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The plaintiffs sued the defendants for defamation. The first plaintiff, Datuk Seri Dr Mohamad Salleh Ismail, was the chairman and director of the second plaintiff, National Feedlot Corporation Sdn Bhd. They claimed that

the first defendant, En Mohd Rafizi Ramli, a politician who at the material time was the strategy director of Parti Keadilan Rakyat, had defamed them at a press conference held on 7 March 2012.

[2] Representatives of the second defendant, MKini Dotcom Sdn Bhd, attended the press conference and recorded its proceedings. The second defendant operates a news website known as Malaysiakini as well as an Internet TV site known as KiniTV. After the press conference, the second defendant published an article on its website regarding the allegations made by En Rafizi and subsequently also uploaded a video clip of its proceedings.

[3] The plaintiffs claimed that the second defendant, by publishing the video clip, was also liable for libel.

Material Background Facts

[4] The background facts of this case, so far as they are material to the determination of the facts in issue, are set out in the following paragraphs. It is noted that En Rafizi has dropped his defence of justification, and for this reason, it will not be necessary to recite all of the factual backgrounds in detail, even though evidence of them may have been led at trial.

[5] Beginning from November 2007, the second plaintiff entered into several agreements with the Government of Malaysia to undertake certain portions of a national feedlot centre project. This project, part of the nation's high-impact national projects, was intended to reduce the nation's dependency on imported meat.

[6] The second plaintiff was to be the integrator of the project. It was to set the criteria for contract farmers and to approve them jointly with the Government, under an entrepreneur development programme. There was certain infrastructure to have been funded directly by the Government, which included the construction of an export-quality abattoir and other infrastructures such as access roads and pasture that was to be grown with Napier grass (a fodder crop).

[7] As part of the agreement with the Government, the second plaintiff received a loan from the Government on terms that were more favourable than that obtainable from commercial banks. The terms of this loan agreement contained a covenant that the money disbursed was only to be used for the purposes of the project.

[8] The national feedlot centre project was subject to audit by the Auditor General (although the second plaintiff itself, as a private enterprise, was not). In November 2011, the Auditor General published its report on the status of the project, which report highlighted a number of its shortcomings. This November 2011 report proved to be the touch-paper that ignited a conflagration of controversy.

[9] At trial, Datuk Seri Salleh disputed any suggestion that the shortcomings of the project were due to any fault of the second plaintiff. His explanation for the shortcomings was that:

(a) the second plaintiff had produced sufficient cattle to be slaughtered to meet the stated production targets, but the reason why there was a shortfall on the numbers actually slaughtered was due to the delay on the part of the Government to construct an export-quality abattoir;

(b) the entrepreneur development programme had not yet been implemented (due to the delay in the infrastructure to be delivered by the Government); and

(c) although the Auditor General's report found that the land identified as pasture was overgrown with acacia, it was an obligation of the Government to hand over land that had been grown with Napier grass.

[10] On 7 March 2012, En Rafizi convened a press conference. At this press conference, he made a number of allegations against the plaintiffs, the gist of which was that a portion of the proceeds of the Government loan given to the second plaintiff for the purposes of the national feedlot centre had been deposited with a commercial bank, and that this deposit was then used as leverage for personal loans that were used for the purchase eight units of offices in KL Eco City, an office block under development in Kuala Lumpur.

[11] The basis of these contentions was certain documents that En Rafizi claimed to have received anonymously. These documents, some of which were appended to his press release in redacted form, were print-outs from the records of a commercial bank, showing:

(a) customer profiles of the plaintiffs, of companies related to the plaintiffs and of directors of such companies; and

(b) the details of the eight KL Eco City office units recorded as collateral in the bank's collateral system.

[12] Datuk Seri Salleh testified that he and one of his sons had entered into sale and purchase agreements to purchase the eight KL Eco City office units and for this purpose had obtained a loan offer from Public Bank Berhad. However, the loan facility was cancelled on 4 January 2012 without having been drawn down. Hence, on the date of the press conference convened by En Rafizi, there was no loan or any loan offer outstanding to Datuk Seri Salleh or his son.

The Claim And The Defences Raised

[13] As mentioned earlier, the plaintiffs claimed that the statements made by En Rafizi at the press conference and the press release issued on the same occasion were defamatory of the plaintiffs. The plaintiffs also claimed against the second defendant for the publication of the video clip recording the proceedings of the press conference.

[14] En Rafizi initially raised the defence of justification, but this was dropped at the submission stage. He also raised the defences of fair comment and qualified privilege.

[15] The second defendant initially raised the defence of fair comment, but this was not pursued in submissions, and so I take it as having been abandoned. In addition, the second defendant also claimed that it was protected by qualified privilege and the related defence of reportage.

[16] Before addressing the legal analysis of the claims, the following additional points of observation should be made:

(a) in the course of trial, I had made a ruling to disallow evidence relating to other transactions that were the subject of allegations of misuse of public funds, on the basis that they did not form the subject matter of the current dispute and were thus not relevant. Nonetheless, counsel for the defendants was permitted to establish through the witnesses the existence of these other allegations of misuse of public funds (for the purposes of establishing the qualified privilege defence), but not to delve into the specific details of those other purported transactions that gave rise to those other allegations of misuse. Although in certain other cases, I may have been prepared to allow evidence to be led and for the determination on relevancy and admissibility to be made after trial, given the nature of these other allegations and the fact that they did not form the subject matter of the present dispute, I was not prepared to permit the court and the system of justice to be used for the purposes of obtaining publicity on these allegations; and

(b) evidence was led at trial on the corporate structure of the companies that were connected with Datuk Seri Salleh and which were involved in the national feedlot project, including National Meat & Livestock Corporation Sdn Bhd and Real Food Company Sdn Bhd. It transpired that the second plaintiff did not own shares in these other companies, whether directly or indirectly. In this case, the second plaintiff sought to claim against the defendants for loss of earnings, which it alleged were the result of the statements made by the defendants. However, even assuming that the losses could be proven to have been caused by the defendants, if the second plaintiff was not the majority shareholder (or even a shareholder at all) in the companies that were expecting to obtain profits, then it was not the second plaintiff that had suffered losses from the alleged wrongdoing by the defendants.

The Claim Against En Rafizi

[17] In the present case, it was not in dispute that the impugned statement had been published and that the statement referred to the plaintiffs. The next question for consideration is therefore whether the statement was defamatory of the plaintiffs.

Whether The Statement Was Defamatory

[18] The tort of defamation arises when there is a publication which has a tendency to lower a person's reputation or to cause him to be shunned or avoided by reasonable persons in society, thus adversely affecting his

reputation. The applicable test to ascertain whether or not a statement is defamatory of a plaintiff is set out in the case of *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors*[1], which establishes that the test is an objective one:

> The test involved in determining whether or not the words complained of are defamatory is also a two stage process. Firstly, it must be considered what meaning the words would convey to an ordinary person. Once this has been established, secondly it must be considered whether under the circumstances in which the words were published, the reasonable man would be likely to understand them in a defamatory sense. The abstraction of the reasonable man was to create a balance between freedom of speech and the protection of reputation. The test of whether the words are capable of conveying a defamatory meaning is a question of law calling for a decision by the Court.

[19] In my judgment, the statement has the effect of lowering the estimation of the plaintiffs in the eyes of the public. The impugned statement included the following words:

> Secara jelas, ini membuktikan bagaimana dana awam yang diberikan kepada NFC untuk mengusahakan projek fidlot telah diselewengkan untuk dijadikan jaminan untuk mendapatkan pinjaman peribadi dan dibelanjakan dengan membeli hartanah-hartanah di atas nama peribadi mereka.

[20] The statement above alleged that public funds had been misappropriated (diselewengkan). Even if the words dijadikan jaminan can be read to mean "used as leverage" rather than "guarantee", in my view the use of the word "diselewengkan" suggests that public funds were somehow put at risk by reason of the fact that the funds had been used as leverage to obtain personal loans. It is also my view that "misappropriation" is only an approximate translation of "diselewengkan", and that this term in the national language contains a connotation of dishonesty beyond mere impropriety. As such, whether or not "jaminan" ought to be translated as "leverage" rather than the more common "guarantee" is to a certain extent immaterial to the determination of the issue of whether the statement was defamatory.

[21] En Rafizi had gone on to state in the impugned statement as follows:

> Kaedah menyalahgunakan dana awam untuk mendapatkan pinjaman peribadi seperti ini adalah menyalahi mandat yang diberikan kepada NFC untuk membangunkan projek berkepentingan nasional.

[22] Learned counsel for the plaintiffs had translated kaedah menyalahgunakan as "method of misappropriation". "Seleweng", in my view, is a more serious allegation than "salah guna". The latter may be the result of mere negligence or lack of care, whereas "seleweng", as mentioned earlier, implies an element of dishonesty.

[23] A reasonable reader reading the statement would, in my view, conclude that public funds had been dishonestly misappropriated by the plaintiffs and that these funds were put at risk by the conduct of the plaintiffs. The statement goes on to the state:

> ... dan dibelanjakan dengan membeli hartanah-hartanah di atas nama peribadi mereka.

[24] This is, my view, is also defamatory of the plaintiffs as it suggested that public funds had been spent in the purchase of properties in the private names of the directors of the second plaintiff. "Dibelanjakan" in this sentence refers to "dana awam", and not "pinjaman peribadi". In other words, a reasonable reader reading this paragraph would surmise that public funds have been used (a) as a guarantee or leverage to obtain personal loans and (b) had been expended to purchase real estate in the private names of the first plaintiff's family members.

[25] Based on the evidence received at trial, there is no evidence that public funds were somehow used as collateral or security or otherwise put at risk, even if the contention of En Rafizi is accepted that he only meant that the funds disbursed to the second plaintiff had been used as leverage.

[26] As far as the second plaintiff is concerned, it is well established that a company may sue for defamation[2]. I find that the statements made by En Rafizi were also defamatory of the second plaintiff, as they suggest that the second plaintiff had misused the proceeds of the Government loan by allowing its directors to raise financing by leveraging on the deposit.

[27] Having established that the statement issued by En Rafizi was defamatory, the next consideration is whether any of his pleaded defences can be sustained.

En Rafizi's Defences

[28] In the course of the preparation of submissions, counsel for En Rafizi informed the plaintiffs' counsel that he was abandoning the defence of justification. Counsel for the plaintiffs contended that, despite this, En Rafizi had, throughout the course of trial maintained the truth of his assertions, and had thus compounded the defamatory statement.

[29] The remaining defences of En Rafizi are that the statement amounted to fair comment and that he was protected by qualified privilege. These are considered in turn in the following paragraphs.

Fair Comment

[30] In order to succeed in his defence of fair comment, En Rafizi will need to establish the following four elements[3]:

(a) the words complained of are comment, although they may comprise or include inferences of fact;

(b) the comment is on a matter of public interest;

(c) the comment is based on facts; and

(d) the comment is one which a fair-minded person can honestly make on the facts proved.

Were The Words In The Statement Commentary?

[31] The meaning of comment is explained in *Gatley on Libel and Slander* in the following terms, which has been cited with approval in the case of *Joshua Benjamin Jeyaretnam v. Goh Chok Tong*[4].

> Comment is a statement of opinion on facts. It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say he did the act so criticised … while a comment is usually a statement of opinion as to merits or demerits of conduct, an inference of fact may also be a comment. There are, in the cases, no clear definitions of what is comment. If a statement appears to be one of opinion or conclusion, it is capable of being comment.

[32] In my judgment, the statements made by En Rafizi were couched as statements of fact and did not constitute comment. The statement, in gist, asserted that (among others):

(a) public funds had been misused for the personal benefit of Datuk Seri Salleh's family; and

(b) public funds had been misappropriated by Datuk Seri Salleh.

[33] It may be argued that the statements made by En Rafizi were inferences of fact, which may constitute commentary according to *Gatley*. If so, it falls to be determined whether the facts from which the conclusions of En Rafizi were inferred had been sufficiently established.

Were The Comments Based On Facts That En Rafizi Established To Be True?

[34] In the case of *Joshua Benjamin Jeyaretnam v. Goh Chok Tong (supra)*, the Judicial Committee of the Privy Council held:

> It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.
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> > The basic facts are those which go the pith and substance of the matter: see *Cunningham-Howie v. Dimbleby* [1951] 1 KB 360, 364. They are the facts on which the comments are based or from which the inferences are drawn — as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts: see *Kemsley v. Foot* [1952] AC 345 but he must get them right and be ready to prove them to be true;
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> (per Lord Denning MR in *London Artists Ltd v. Littler* [1969] 2 QB 375.

[35] In the present case, the assertion by En Rafizi that public funds have been misappropriated by Datuk Seri Salleh was premised on the documents that En Rafizi had obtained. On the face of these documents, they showed (among others) that the second plaintiff, National Feedlot Corporation Sdn Bhd, had deposited an amount of approximately RM71.4 million[5] with a bank (subsequently identified as Public Bank Berhad) and that eight properties were recorded in the collateral system of the bank. The cumulative forced sale value of these properties was approximately RM9.69 million. These properties were identified as the eight office units in the KL Eco City project.

[36] In my judgment, the documents by themselves cannot justify the inference that has been drawn by En Rafizi. There was nothing in the documents themselves that suggested that the deposit by the second plaintiff had been used either as leverage or as security or collateral for the grant of any loan. More importantly, in order to be able to avail himself of the defence of fair comment, it would have been necessary for En Rafizi to establish the basic fact that no loan would have been granted but for the fact of the deposit of the RM71.4 million by the second plaintiff. By his own admission, En Rafizi did not have any knowledge regarding Datuk Seri Salleh's other sources of income. Hence, he was not able to say whether or not the bank would have granted the loan solely on the credit standing of Datuk Seri Salleh.

[37] In other words, the basic facts then available to En Rafizi do not in my view support the inference that he had drawn from those facts.

[38] In this particular case, the facts established at trial have shown that some of the basic facts purported to have been established by the documents were in fact, wrong; for example, at the time of the publication in question, the offer for the loan from Public Bank to Datuk Seri Salleh and his son had already been withdrawn. As such, the recording of the properties in the bank's collateral system was inaccurate.

[39] Having established that the inference made by En Rafizi was not supportable by the facts, I am of the view that En Rafizi has failed to establish the third of the four elements specified in *Joshua Benjamin Jeyaretnam v. Goh Chok Tong*, and hence the defence of fair comment would not be available to En Rafizi. I do not consider it necessary to consider the second or fourth elements in detail, but it suffices for me to conclude that while I am persuaded that the matters commented on is one that is in the public interest, the comment made by En Rafizi is not one that a fair-minded person could have honestly made based on that facts that were available to him at the time.

Qualified Privilege

[40] En Rafizi raised the defence of qualified privilege. In circumstances where there exist a reciprocal duty and interest between the publisher of a defamatory statement and the recipient of such statement, the court will uphold a defence of privilege in the publication of the statement. However, this privilege will be defeated if the publication was motivated by malice.

[41] The circumstances under which a publication was made must be examined in order to determine whether the defence of qualified privilege can be afforded to a defendant. In the leading case of *Reynolds v. Time Newspapers Ltd*[6], the House of Lords set out the factors for consideration:

> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.
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> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case.

[42] In Malaysia, the principles of responsible reporting in *Reynold*s have been extended to all publishers of material in the public interest, such that even members of Parliament commenting on matters of public interest must adhere to the principles of responsible reporting in order to be accorded privilege: see *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee*[7].

[43] In the circumstances of this case, it is not seriously in dispute that the nature of allegations against the plaintiffs was serious, and was suggestive of conduct that may potentially have penal consequences. The plaintiffs concede that the subject matter of the publication was one that was of public concern.

[44] Based on En Rafizi's testimony, he had received the information that formed the basis of his press statement anonymously, and it was only later that he found out the identity of the tipper, Johari Mohamad, who was an employee of Public Bank at the material time. I find no reason to doubt En Rafizi's testimony in this regard.

[45] Accordingly, En Rafizi had no way of verifying the accuracy or completeness of the information contained in the documents. Nor did he have any means of assessing the reliability of the source of the information, given the fact that the documents had been passed to him anonymously. His testimony was that he was certain that the documents formed part of a credit report, based on his own experience.

[46] I pause here to make the observation that En Rafizi is a man of uncommon intelligence, who had studied engineering and had subsequently qualified as a chartered accountant. Having practised as an accountant for more than three years in England, he came back to Malaysia and held a major job with Petronas.

[47] I find that En Rafizi would have known that documents had been passed to him in breach of banking secrecy obligations. It would therefore, have been apparent to him that the information contained in the documents could not have been verified by the bank in question.

[48] Nonetheless, no attempt was made to contact Datuk Seri Salleh to verify the inferences that he had drawn from the contents of the documents. It will be recalled that even on the date the documents had been printed (16 February 2012), the loan offer from Public Bank had been withdrawn, and as such the information contained in the collateral system was inaccurate from the very outset.

[49] Even though the subject matter of the publication could be said to be of public concern due to the fact that the second plaintiff was a recipient of a loan from the Government, the matter was not one that was so urgent that the need for verification could be dispensed with. It will be seen that En Rafizi had time to analyse the contents of the documents and to prepare a three-page press statement. In my judgment, if there was sufficient time to have prepared a press statement, then there would have been time to contact the plaintiffs for verification of the allegations, or for the plaintiffs' side of the story to be presented.

[50] Had a confirmation been sought from the plaintiff, the plaintiff would have had the opportunity to explain that the offer for the loan had lapsed, hence the question of misuse or misappropriation of public funds did not arise. Even if the plaintiff has failed to respond, En Rafizi could then say that steps had been taken to verify the information contained in the press release.

[51] As it happened, En Rafizi took the considered risk of publishing information that had not been verified. He must now bear the consequences of his actions. It has also to be borne in mind that the tone of the press conference was not one that merely called for inquiries or investigations, but contained allegations of misappropriation and misuse of funds dressed as statements of fact.

[52] I accordingly find that En Rafizi's defence of qualified privilege has not been made out.

[53] In the course of oral submissions, learned counsel for the plaintiffs argued that it would be contrary to public policy to grant privilege to a person who had published a statement based on illegally obtained documents. While at first blush there may appear to be some merit in this proposition, I am not prepared to agree with such a sweeping statement. For example, if the documents, even if illegally obtained, could have prevented the commission of another offence, the balance of justice may well lie in according privilege. Nonetheless, as I have found that En Rafizi has not satisfied the requirements in *Reynold*'s case, it will not be necessary for me to make a ruling on this point.

The Claim Against Malaysiakini

[54] The plaintiffs' claims against the second defendant relate to the publication of the audiovisual recording of En Rafizi's press conference on 7 March 2012.

[55] Since I have determined that the statements made by En. Rafizi are defamatory, what remains to the decided are whether the second defendant is able to avail itself of its pleaded defences.

The Defences

[56] In its defence, the second defendant pleaded qualified privilege and fair comment. However, the written submissions of learned counsel for the second defendant dealt only with qualified privilege and the related defence of reportage. Accordingly, I have taken that the defence of fair comment was not being pursued by the second defendant.

Reportage As Qualified Privilege

[57] In the case of *Al-Fagih v. HH Saudi Research and Marketing (UK) Ltd*[8], reportage was described as neutral reporting of attributed allegations, rather than their adoption by a newspaper. In that case, the Court of Appeal by a majority held that the defendant's failure to attempt verification did not vitiate the defendant's plea of qualified privilege. This was so because, based on the circumstances of this case, both sides of the dispute have been fully, fairly and disinterestedly reported in their respective allegations and responses.

[58] It is important to appreciate that this case does not provide for a general exclusion for the reporting of correctly attributed and unadopted allegations. Simon Brown LJ explicitly recognised that such a report would be defamatory under the repetition rule. For a detailed exposition of the inter-relationship between reportage and the repetition rule, see *Roberts v. Gable*[9], at paras. 54 to 59.

[59] The case of *Roberts v. Gable* is instructive because it makes it clear that reportage is an example of qualified privilege, and because it outlines the factors to be taken into account in considering whether the defence of reportage is available in a particular case:

Reportage and Reynolds qualified privilege

60 Once reportage is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is, as was conceded in the *Al-Fagih* case [2002] EMLR 215 a form of, or a special example of, *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. It cannot be a defence *sui generis* because the *Reynolds* case [2001] 2 AC 127 is clear authority that whilst the categories of privilege are not closed, the underlying rationale justifying the defence is the public policy demand for there to be a duty to impart the information and an interest in receiving it: see p 194 g. If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed.

The proper approach to the reportage defence

61 Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of reportage.

(1) The information must be in the public interest.

(2) Since the public cannot have an interest in receiving misinformation which is destructive of the democratic society (see Lord Hobhouse of Woodborough in the *Reynolds* case, at p 238), the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published: see, also in the *Reynolds* case, Lord Nicholls's factor 4, at p 205 b, and Lord Cooke, at p 225, and in the *Jameel* case [2007] 1 AC 359, Lord Bingham of Cornhill, at para 12 and Baroness Hale, at para 149. This is where reportage parts company with the *Reynolds* case [2001] 2 AC 127. In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.

(3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ in the *Al-Fagih* case [2002] EMLR 215, paras 65, 67–68 and the speech of Lord Hoffmann in the *Jameel* case [2007] 1 AC 359 , para 62 cited in paras 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramaniam v. Public Prosecutor* [1956] 1 WLR 965, 969. If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.

(4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his

A intention was though his evidence may well be material to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.

(5) This protection will be lost if the journalist adopts the report and
B makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report.

(6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that
C concept has developed from the *Reynolds* case [2001] 2 AC 127, the burden being on the defendants. In this way the balance between article 10 and article 8 can be maintained. All the circumstances of the case and the ten factors listed by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered
D in order to reach the necessary conclusion that this was the product of responsible journalism.

(7) The seriousness of the allegation (Lord Nicholls's factor 1) is obviously relevant for the harm it does to reputation if the charges are untrue. Ordinarily it makes verification all the more important. I am not sure Latham LJ meant to convey any more than that in
E para 68 of his judgment in the *Al-Fagih* case [2002] EMLR 215 cited in para 39 above. There is, however, no reason in principle why reportage must be confined to scandal-mongering as Mr Tomlinson submits. Here equally serious allegations were being levelled at both sides of this dispute. In line with factor 2, the criminality of the actions bears upon the public interest which is the critical question:
F does the public have the right to know the fact that these allegations were being made one against the other? As Lord Hoffmann said in the *Jameel* case [2007] 1 AC 359, para 51:

> The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no
G public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.

All the circumstances of the case are brought into play to find the
H answer but if it is affirmative, then reportage must be allowed to protect the journalist who, not having adopted the allegation, takes no steps to verify his story.

(8) The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as
I preconditions for reportage on the defendant being a responsible prominent person or the claimant being a public figure as may be required in the USA.

(9) The urgency is relevant, see factor 5, in the sense that fine editorial judgments taken as the presses are about to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time. That is not to say, as Mr Tomlinson would have us ordain, that reportage can only flourish where the story unfolds day by day as in the *Al-Fagih* case. Public interest is circumscribed as much by events as by time and every story must be judged on its merits at the moment of publication.

[60] Reportage has been accepted as a form of qualified privilege in Malaysia. In *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor*[10], Harmindar JC (now JCA) cited with approval the decisions of *Al-Fagih and Roberts v. Gable* (among other decisions) and stated as follows:

[76] From a consideration of the cases cited, it can be safely asserted that reportage would normally apply as follows. It would only apply in cases where there is an ongoing dispute where allegations of both sides are being reported. The report, taken as a whole, must have the effect that the defamatory material is attributed to the parties in the dispute. The report must not be seen as being put forward to establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore reportage will not apply where the journalist had embraced, garnished and embellished the allegations.

[61] In that case, the defence of reportage was held to not apply because only one party's version of events had been put forward and because the reporting was held not to be mere neutral reporting but had contained independent inferences that had been made by the reporter.

Whether Reportage Defence Available To The Second Defendant

[62] The plaintiffs' complaint against the second defendant was that it had broadcasted the video recording of En Rafizi's press conference, and hence had republished the libel.

[63] The video recording of the press conference had been uploaded into a news article published on the second defendant's website. This article, reproduced at D/24 in the trial bundles, is relevant because it goes towards the issues of (a) whether the reporting had the effect of reporting the purported truth of the statements or merely the fact that they were made and (b) whether the journalist had adopted a report and made it her own or had reported the story in a fair, disinterested and neutral way (see factors 3, 4 and 5 from the judgment of Ward LJ in *Roberts v. Gable*, reproduced at para. 59 *ante*).

[64] At trial, the journalist in question testified that it would have been the normal practice of the second defendant to have sought comments from the party against whom an allegation was made, but that in the particular instance, she could not recall having contacted the plaintiff's public relations representative before publishing the article and the video recording.

[65] Counsel for the second defendant invited me to draw an adverse inference against the plaintiffs for their failure to call the public relations consultant to testify.

[66] I decline to do so for the following reasons:

(a) the evidential burden of a fact in issue lies with the person who wishes to prove that fact: see s. 103 of the Evidence Act 1950. The fact in issue here is whether the public relations representative had been contacted by the journalist in order to establish whether efforts had been made to verify the information contained in En Rafizi's press release. The evidential burden therefore, lies with the second defendant, since it is the second defendant that wishes to persuade the court that the public relations consultant had been contacted; and

(b) where an evidential burden of a fact in issue does not lie with a party, no presumption may be raised under s. 114(g) of the Evidence Act 1950 against that party for his failure to call a material witness to prove or to disprove such fact: see *Selvaduray v. Chinniah*[11].

[67] Accordingly, I find that the second defendant has not proven, on balance, that efforts had been made to contact the plaintiffs or their representatives prior to the republication of the libel.

[68] Of course, the failure to conduct verification does not, without more, necessarily exclude the application of the defence of qualified privilege. See the case of *Al-Fagih* discussed at para. 57 above and the *dicta* of Ward LJ in *Roberts v. Gable*, which establishes the principle that in reportage cases, there would not arise any need to take steps to ensure the accuracy of the published information.

[69] Based on the evidence received at trail, the second plaintiff had issued a media statement denying the fact that the properties in question had been purchased by it. A statement to this effect was added to the article accompanying the video clip, at approximately 11pm on the same day, ie, on 7 March 2012.

[70] Learned counsel for the second defendant also sought to refer to previous instances where the second defendant had published statements from a director of the second plaintiff relating to other incidents involving the plaintiffs that were not the subject of the current proceedings (see D2/122 and D2/160). The contention here is that the second defendant has demonstrated that it had in the past presented both sides of the story to its readers. However, these documents, although categorised as part B documents, were not referred to in any witness statement of the witnesses who had appeared for the second defendant.

[71] There is conflicting authority on the issue of whether documents that have been categorised as part B in the course of pre-trial case management conferences pursuant to O. 34 r. 2(2)(e) of the Rules of Court 2012 would

be considered to have been received into evidence even in the absence of any specific reference by any witness to such documents. The position in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor*[12] was that such document:

> … do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

[72] However, the case of *Jaafar bin Shaari* predates the advent of the Rules of Court 2012, and it would appear to me that the better view would be that such documents would be automatically admissible, with the only issue being the weight to be attached to the document, in the light of O. 34 r. 2(2)(e) read together with s. 58 of the Evidence Act 1950. In any event, in the present case, those news reports in bundle D2 were referred to by counsel in his submissions, and as such would have satisfied the requirements laid down by Peh Swee Chin FCJ in *Jaafar bin Shaari*.

[73] Having considered the evidence as a whole, I find that the second defendant is accorded the defence of reportage. I do so for the following reasons:

(a) it is not in dispute that the information that was sought to have been disclosed by En Rafizi was in the public interest;

(b) even though I am not satisfied that the second defendant had attempted verification of the accuracy of the statements contained in the press release, the failure to undertake such verification is not fatal to a defence of reportage, based on the authority of *Roberts v. Gable*;

(c) I find that the effect of the reporting by the second defendant, when viewed as whole and evaluated objectively, was to report the fact that the statements had been made at the press conference convened by En Rafizi, rather than for the purposes of persuading the reader and/or viewer of the truth of their contents. That this was so was evident from the fact that the article to which the video clip was linked clearly attributed the various statements made to En Rafizi by reproducing them in quotation marks. As for the video recording itself, the input by the second defendant was limited to the inclusion of captions and graphics. I am of the view that the video clip was a faithful recording of the actual events that had taken place, lending support to the finding that the thrust of the reporting was to show the fact that the statements had been made by En Rafizi;

(d) I am also of the view that the reporting had been done in a fair, disinterested and neutral way. An audiovisual recording of the events that had actually taken place would in the vast majority of cases be construed as such, and there is no suggestion that the video recording

had been edited in a way as would render it misleading or unrepresentative of the actual events that had taken place. The accompanying news article at D/24 of the trail bundles also, as mentioned earlier, clearly attributed quotes to En Rafizi. From this, I conclude that the journalist in question did not adopt the statements as her own. In addition, the updating of the article at approximately 11pm on the same day to include the response from the second plaintiff further supports the finding that the reporting was done in a fair and neutral manner; and

(e) the urgency of the matter justified the publication of the reporting, even in the absence of verification from the plaintiffs. Here, the second defendant is judged differently from En Rafizi, who had had much time to peruse, analyse and reflect on the import of the documents that had been leaked to him. The second defendant is part of what may be termed as the alternative media, where great currency is placed on the immediacy of reporting. Given the circumstances, the decision by the second defendant to proceed to publish the report and the accompanying video clip cannot be faulted.

[74] It was advanced for the plaintiffs that the failure to verify amounted to malice on the part of the second defendant. This submission overlooks the principle that malice cannot be established merely because of a defendant's failure to verify the accuracy or reliability of the statements: see *Al-Fagih*'s case, at para. 55.

[75] For these reasons, the plaintiffs' claims against the second defendant are dismissed.

Damages

[76] The plaintiffs had led evidence to show that, following the publication of the defamatory statements, the business of the second plaintiff had deteriorated significantly. I am not persuaded that the deterioration in the second plaintiff's business had anything to do with the acts of En Rafizi. By the plaintiffs' own evidence, one of the stumbling blocks that they had encountered in their business was the failure of the Government to construct an export-quality abattoir and to put in certain infrastructure for the feedlot project[13].

[77] Quite apart from the causality of the second plaintiff's loss, I also was not persuaded that the projected income that the second plaintiff claimed it could have earned proved the losses that it claimed to have suffered, for the simple reason that no evidence was led on the costs of sales and operations. The documents at pp. 7-11 of bundle F of the trial documents only showed historical and projected revenue of the second plaintiff's group of companies. The revenue figures on their own would not allow profits to be ascertained.

[78] In addition, there is the issue of whether the second plaintiff is the proper plaintiff to sue for the losses occasioned to the other companies connected to Datuk Seri Salleh, for the reasons explained at para. 16(b), *ante*.

[79] Accordingly, I will assess the damages based on the general reputational loss occasioned to the plaintiffs.

[80] The general principles applicable for the determination of the quantum of damages in defamation cases would include the gravity of the allegation, how broadly the statements had been circulated, the effect of the publication, the nature and extent of the plaintiff's reputation as well as the behaviour of the respective parties. See, for example the decision of the Court of Appeal in *Chin Choon @ Chin Tee Fat v. Chua Jui Meng*[14], in which case courts were also encouraged to maintain the practice of making a global award in defamation cases without the need for separate awards for aggravated and/or exemplary damages.

[81] In relation to Datuk Seri Salleh, I award the global sum of RM150,000 in damages, having taken into account the following factors:

(a) the nature of the allegation against him serious, and suggestive of criminal impropriety by, for example, the use of the word "diselewengkan";

(b) the defamatory statements had been published to the media in a press conference and were subsequently republished in the second defendant's online news portal. Although the article itself sat behind a paywall and was only accessible to subscribers of the second defendant's service, the video recording was more widely available, even to non-subscribers;

(c) Datuk Seri Salleh testified on his background as a lecturer and associate professor of a university, his tenure as head of the Consulting and Technology Transfer Division of SIRIM, his work to establish the Technology Park Malaysia and following retirement his position as Chairman of Institut Jantung Negara. He is also the recipient of, among others, a datukship from the Federal Government. None of these was disputed. It would therefore be fair to say that Datuk Seri Salleh is well known and respected as a person, even independently of the fact that he is married to Tan Sri Shahrizat Abdul Jalil, who was at the material time a member of the Malaysian Cabinet;

(d) even though En. Rafizi had dropped his defence of justification, this was only done at the submission stage. Throughout his testimony at trial, he continued to maintain that he had been fully justified to have said what he did. In so doing, he had compounded his defamatory statement. The award of global damages to both the plaintiffs have therefore taken into account the aggravating conduct of En Rafizi in this regard; and

(e) Dato' Morais for the plaintiffs argued that En Rafizi did not care whether the statements he had made were true or false, and hence he ought to also be liable for further aggravated damages on the basis that

such a lack of care as to the truthfulness of the statements would be capable of establishing malice, and the presence of malice would justify the grant of aggravated damages.

In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors*[15], Richard Malanjum J (now CJSS) stated as follows:

> Malice can also be inferred where a defendant made a defamatory statement knowing it to be false, or he did not believe what he published was true, or that he made it recklessly, not caring whether it was true or false; or where he deliberately stopped short in his inquiries in order not to ascertain the truth. Generally, honest belief to the truth of the statement is sufficient to negate malice. But, if it can be shown that the dominant motive of a defendant in making the statement was to vent personal spite or the desire to injure or to obtain private advantage or some other purposes rather than in the exercise of the relevant duty, then honest belief itself is not sufficient to rebut express malice. Further, where a defendant's desire to comply with the relevant duty or to protect relevant interest is not the significant part for his reason in publishing the defamatory statement, express malice can be inferred. But in the first place it is for the plaintiff to prove affirmatively that the defendant did not believe what he published was true or was indifferent to the truth or falsity of the statement.

In the circumstances of the present case, En Rafizi in cross-examination did indicate that he was indifferent as to the effect that his statement may have had on the business of the plaintiffs. His concern was for public funds to be accounted for and protected.

Even though En Rafizi may not have cared for the effect that his statements may have had on the plaintiffs, I find that he nonetheless had an honest belief firstly that his allegations were true and that secondly that he was performing a public duty in agitating for greater accountability for public funds. While his honest belief in the truth of his allegations is not a relevant consideration for determining the question of whether or not the statements made were defamatory (for the test to be applied is an objective one), this honest belief is nonetheless a relevant consideration in determining the question of whether or not the publication was motivated by malice. I find therefore that, following the *dicta* of Richard Malanjum J in *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd*, malice on the part of En Rafizi has not been proven, and I therefore, dismiss the claim for further aggravated damages.

[82] In as far as the second plaintiff is concerned, I award global damages of RM50,000, taking into account that the nature of the allegation against the second plaintiff was different from that against Datuk Seri Salleh. The sting of the defamation against the company was that it had made a deposit with Public Bank and had permitted this deposit to be used as leverage against

personal loans taken by its directors. I am also of the view that the second plaintiff cannot claim to have a reputation that was as highly regarded as Datuk Seri Salleh. As discussed earlier, I was not satisfied that the loss of profits claimed to have been suffered by the second plaintiff can be correctly attributed to the defamatory words published by En Rafizi.

[83] The final issue relates to the claim by the plaintiffs for exemplary damages. The case of *Rookes v. Barnard*[16] restricted exemplary damages to the following three situations:

(a) where they are recognised by statute;

(b) where the wrong involves oppressive, arbitrary or unconstitutional actions by agents of the Government;

(c) where the defendant's tortious act has been done with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty.

[84] In the present instance, I am not satisfied that any of these criterias has been met, and I accordingly dismiss the claim for exemplary damages against En Rafizi.

Orders

[85] For the reasons explained above, the court orders as follows:

(a) En Rafizi is liable in damages to Datuk Seri Salleh in the amount of RM150,000;

(b) En Rafizi is liable in damages to the second plaintiff in the amount of RM50,000;

(c) an injunction is granted in favour of the plaintiffs against the defendants, their agents and representatives from publishing or continuing the publication of any of the defamatory statements that have been made the subject matter of this suit;

(d) the plaintiffs are to be compensated at a rate of 5% per annum on the respective judgment sums from the date of this judgment until full satisfaction of the judgment debts;

(e) the plaintiffs' claims against the second defendant are dismissed;

(f) En Rafizi is to pay costs of RM100,000 to the plaintiffs collectively; and

(g) the plaintiffs collectively are to pay costs of RM50,000 to the second defendant.

Endnotes:

1. [2003] 6 CLJ 559, [2003] 4 AMR 136, [2003] 4 MLJ 96, [2003] 2 MLRH 439.
2. See for example, *Doree Industries (M) Sdn Bhd v. Sri Ram* [2001] 4 CLJ 446, [2001] 3 AMR 3529, [2001] 6 MLJ 532, [2001] 2 MLRH 145.
3. See *Joshua Benjamin Jeyaratnam v. Goh Chok Tong*, *op. cit*, footnote 4
4. [1989] 1 LNS 34, [1989] 3 MLJ 1, [1989] 1 MLRA 500
5. For ease of reference, all figures in this judgment are rounded to three significant figures.
6. [2001] 2 AC 127.
7. [2015] 8 CLJ 477, [2015] 6 AMR 66, [2015] 6 MLJ 187, [2015] 6 MLRA 63.
8. [2001] All ER (D) 48.
9. [2007] EWCA Civ 721.
10. [2010] 5 CLJ 301, [2010] 3 AMR 514, [2010] 2 MLJ 492, [2009] 4 MLRH 48.
11. [1939] 1 LNS 107, [1939] MLJ 253, [1939] 1 MLRA 446.
12. [1997] 4 CLJ 509, [1997] 4 AMR 3744, [1997] 3 MLJ 693, [1997] 1 MLRA 605.
13. see para. 9, *ante.*
14. [2005] 2 CLJ 569, [2005] 3 AMR 189, [2005] 3 MLJ 494, [2004] 2 MLRA 636.
15. [1995] 1 LNS 304, [1996] 1 MLJ 393, [1995] 4 MLRH 877.
16. [1964] AC 1129.